

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
March 28, 2006 Session

STATE OF TENNESSEE v. THOMAS MARTIN MCGOUEY

**Direct Appeal from the Criminal Court for Knox County
No. 79176 Mary Beth Leibowitz, Judge**

No. E2005-00642-CCA-R3-CD - Filed May 24, 2006

The defendant, Thomas Martin McGouey, was convicted by a Knox County jury of aggravated assault and felony reckless endangerment. On appeal, he argues: (1) an unloaded pellet gun without a propulsion source is not a deadly weapon and (2) the evidence was insufficient to sustain his convictions. Following our review of the record and the parties' briefs, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which JERRY L. SMITH and ALAN E. GLENN, JJ., joined.

Mark E. Stephens, District Public Defender, (at trial and on appeal), and John Halstead (at trial) and J. Steven House, (on appeal), Assistant Public Defenders, Knoxville, Tennessee, for the appellant, Thomas Martin McGouey.

Paul G. Summers, Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; Randall E. Nichols, District Attorney General; and C. Lewis Walton, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

The defendant was charged with aggravated assault and reckless endangerment arising out of a botched "suicide by police officer" attempt. Below is a summation of the trial testimony relevant to the issues on appeal.

Officer Mark Kennedy testified that he was on patrol in the early morning hours of September 16, 2003, when he received a call that there was a man in the parking lot at the

Woodlands West Apartment complex “shooting or firing or threatening to hurt himself and others.” Officer Kennedy headed to a nearby convenience store where he met four other officers before going to investigate the call. The officers went “like ducks in a row . . . follow[ing] each other in towards . . . the apartment complex” where they were met by Officer Strzelecki. As the patrol cars pulled into the complex, Officer Kennedy noticed an individual matching the 911 description in the field or courtyard area ahead of him.

Officer Kennedy described the lighting in the field as dim but light enough for the officers to see the defendant. The defendant was “just standing in the middle of this field with his hands behind his back, and there was nobody else around, [he was] just standing there.” The officers lined up in a “half moon shape” with Officer Kennedy standing directly in line with the defendant. The two officers on Officer Kennedy’s left told the defendant to “drop whatever was behind his back,” but when the defendant did not listen to the officers, Officer Kennedy began giving commands. Officer Kennedy stated that the defendant began focusing on him and walking toward him while simultaneously raising and pointing a weapon at him.

Officer Kennedy testified that when the defendant pointed the weapon at him they were thirty to thirty-five yards apart. Officer Kennedy stated that he did not see the weapon until the defendant brought it out from behind his back. The weapon appeared to be a “semiautomatic type pistol, similar to what [police officers] carry.” When the weapon was pointed at him, Officer Kennedy stated he “could just picture getting shot at” and was stressed and scared that somebody was “going to get hurt bad at that point.” Officer Kennedy fired his weapon at the defendant nine times but did not know whether he actually hit the defendant because all six of the officers were shooting. The defendant fell to the ground, and the officers approached him and noticed he was still alive. Officer Kennedy did not examine the defendant’s weapon, but another officer told him that he had secured the weapon.

On cross-examination, Officer Kennedy admitted that being thirty to thirty-five yards away from the defendant equaled ninety to one hundred and five feet. Also, in response to questioning, Officer Kennedy explained that although the field where the shooting took place was backed by an embankment and trees, the situation was not “100% safe” for everyone other than the defendant himself. He explained that the bullets could have ricocheted and that it was “possible that anybody could have been injured” because the officers did not know what they were “shooting into if [they] miss[ed] [the defendant].”

Officers Darryl Hamilton, Grayson Fritts, Lee Strzelecki, Benjamin Hibbert, and Clifford Russell testified similarly to Officer Kennedy. Officer Fritts also testified that he was near the defendant after the defendant was shot and noticed a target drawn on the defendant’s chest under his shirt. Officer Russell also noticed the “bull’s eye” on the defendant’s chest along with the words “let me die.” Additionally, Officer Hibbert heard the defendant say “I’m sorry” after he was shot, and Officer Strzelecki testified that he rendered first-aid to the defendant, saw the bulls eye and “let me die” written on the defendant’s chest, and that he heard the defendant repeat “just let me die.”

Jack Price, 911 records specialist, testified that he prepared an audiotape of the September 16, 2003, emergency call reporting the gunman at the Woodlands West Apartments as well as retrieved the information from the 911 computer system. The 911 tape was played for the jury.

Crime scene officer, Brad Park, testified that he made a sketch and took measurements of the crime scene. Officer Park also made a detailed diagram that showed the officers' positions during the incident. Officer Park estimated that Officer Kennedy was the farthest away from the defendant at approximately seventy-five feet, and the closest officers were roughly forty feet away from the defendant.

Crime scene officer, Angela Myers, testified that she videotaped and photographed the crime scene and collected evidence. Part of the evidence Officer Myers collected was a "Daisy Power Line, Model 500, CO2, .177 caliber pellet pistol." The weapon did not have any pellets or ammunition in it when she collected it, but she determined that it was functional by checking the safety and checking to make sure the firing mechanism would work once the trigger was pulled. However, Officer Myers did not actually fire the weapon. On cross-examination, Officer Myers admitted that not only was the weapon unloaded, it also did not have a CO2 cartridge.

Officer Michael Grissom testified that he and Chief Sexton were out-of-town at a seminar the day of the incident. Upon receiving a call there had been a shooting involving officers, they left the seminar and drove to the Woodlands West Apartments. At the complex, they investigated the defendant's apartment with the permission of the defendant's girlfriend. The officers noticed a spiral notebook containing writings and a diagram of the area where the incident had occurred as well as two envelopes. Officer Grissom explained that the diagram outlined a scenario where the defendant was the intended target in a "killing zone." On the bottom of the diagram were the words, "'Can't have police call Connie. She will let them know don't have a real gun.' And it has a one aside it. And number two is, 'Pick up some fire crackers to alert others thinking you do have a real gun. I'm sorry, Cory. I loved your mom.'"' The envelopes contained a note to the defendant's employer, a note to his girlfriend, and his request to be cremated. On cross-examination, Officer Grissom elaborated that the diagram also contained the notation, "No one else gets hurt."

Detective Larry Moore testified that he was involved in the investigation of this case. As part of his investigation, he interviewed the defendant, during which the defendant reiterated over and over that he did not mean to hurt anyone. Detective Moore taped the interview and the audiotape was played for the jury and a transcript was provided.

The jury found the defendant guilty of aggravated assault and felony reckless endangerment. The trial court sentenced him as a Range I standard offender to concurrent sentences of three years and one year, respectively. The trial court ordered the defendant serve his sentences in split confinement, giving him credit for time served.

ANALYSIS

Deadly Weapon

The defendant first argues that an unloaded pellet gun without a propulsion source is not a deadly weapon for purposes of Tennessee Code Annotated sections 39-13-102 and 103. Our review of an issue of statutory construction is a question of law that we review de novo with no presumption of correctness. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 924 (Tenn. 1998). In conducting our review, we are “restricted to the natural and ordinary meaning of the language used by the legislature in the statute.” *Browder v. Morris*, 975 S.W.2d 308, 311 (Tenn. 1998) (citing *Austin v. Memphis Pub. Co.*, 655 S.W.2d 146, 148 (Tenn. 1983)). Our role is to “ascertain and give effect to the legislative intent without unduly restricting or expanding a statute’s coverage beyond its intended scope.” *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995); *see also State v. Jennings*, 130 S.W.3d 43, 46 (Tenn. 2004). Therefore, we must follow the natural and ordinary meaning of a statute unless an ambiguity requires resort elsewhere for clarification. *Bryant v. Genco Stamping & Mfg. Co.*, 33 S.W.3d 761, 765 (Tenn. 2000).

Aggravated assault is defined as intentionally or knowingly causing another to reasonably fear imminent bodily injury while using or displaying a deadly weapon. *See* Tenn. Code Ann. §§ 39-13-101(a)(2), -102(a)(1)(B). Felony reckless endangerment is defined as recklessly engaging in conduct that places or may place another person in imminent danger of death or serious bodily injury committed with a deadly weapon. *See id.* § 39-13-103. “‘Deadly weapon’ means: (A) A firearm or anything manifestly designed, made or adapted for the purpose of inflicting death or serious bodily injury; or (B) Anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.” *Id.* § 39-11-106(a)(5). “‘Firearm’ means any weapon designed, made or adapted to expel a projectile by the action of an explosive or any device readily convertible to that use.” *Id.* § 39-11-106(a)(11). “‘Bodily injury’ includes a cut, abrasion, bruise, burn or disfigurement; physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty.” *Id.* § 39-11-106(a)(2). “‘Serious bodily injury’ means bodily injury that involves: (A) A substantial risk of death; (B) Protracted unconsciousness; (C) Extreme physical pain; (D) Protracted or obvious disfigurement; or (E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty.” *Id.* § 39-11-106(a)(34).

It is our view that the language of the statute defining “deadly weapon” is clear and unambiguous; therefore, we will look only to the statute as written. The statute first defines deadly weapon as a “firearm or anything manifestly designed, made or adapted for the purpose of inflicting death or serious bodily injury.” *See id.* § 39-11-106(a)(5)(A). Arguably, a CO2 powered pellet gun is not a firearm within the definition of Tennessee Code Annotated section 39-11-106(a)(11) because the pellet gun does not expel a projectile by an *explosive*. Nevertheless, a CO2 powered pellet gun is a *deadly weapon* within the definition of Tennessee Code Annotated section 39-11-106(a)(5)(B) because it is capable of causing death or serious bodily injury *when operated as intended*. Accordingly, we conclude that an unloaded and uncharged pellet gun can be considered a “deadly weapon” for purposes of aggravated assault and felony reckless endangerment.

Sufficiency

The defendant next argues that the evidence presented at trial was insufficient to sustain his convictions because the state did not prove the pellet gun was capable of causing death or serious bodily injury in the manner of its use. Our review begins with the well-established rule that once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). Therefore, on appeal, the convicted defendant has the burden of demonstrating to this court why the evidence will not support the jury's verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). To meet this burden, the defendant must establish that no "rational trier of fact" could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Evans*, 108 S.W.3d 231, 236 (Tenn. 2003); Tenn. R. App. P. 13(e). In contrast, the jury's verdict approved by the trial judge accredits the state's witnesses and resolves all conflicts in favor of the state. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). The state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. *Carruthers*, 35 S.W.3d at 558; *Tuggle*, 639 S.W.2d at 914. Questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). We do not attempt to re-weigh or re-evaluate the evidence. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002); *Bland*, 958 S.W.2d at 659. Likewise, we do not replace the jury's inferences drawn from the circumstantial evidence with our own inferences. *See State v. Elkins*, 102 S.W.3d 581, 582 (Tenn. 2003); *Reid*, 91 S.W.3d at 277.

At trial, the state presented testimony from Officer Myers who testified that she checked the safety and the firing mechanism on the pellet gun and determined that it was functional. Although Officer Myers did not fire the gun, she determined that it would work once the trigger was pulled. The gun was entered into evidence as an exhibit. The state urged the jury to look at the exhibit and use its common sense in determining whether the pellet gun was a deadly weapon. The state also pointed out that the side of the gun contained the notation, "Warning. Misuse or careless use may cause serious injury or death."

While the manufacturer's label is certainly not definitive, it does support the jury's determination. Furthermore, a panel of this court has previously determined that an unloaded, yet functional, spring-loaded pellet gun qualified as a deadly weapon. *See State v. Wampler*, No. 03C01-9608-CR-00325, 1997 WL 559433, at *3 (Tenn. Crim. App., at Knoxville, Sept. 9, 1997). Although there are slight differences between *Wampler* and this case, *Wampler* still guides our decision that the evidence was sufficient for the jury to find that the defendant committed aggravated assault and reckless endangerment with a "deadly weapon."

CONCLUSION

Based on the foregoing authorities and reasoning, we affirm the judgments of the trial court.

J.C. McLIN, JUDGE